

1 CHOATE LAW FIRM LLC
 2 424 N. Franklin Street
 3 Juneau, Alaska 99801
 4 Telephone: (907) 586-4490
 5 Facsimile: (907) 586-6633

6 Attorneys for Plaintiff

7 **UNITED STATES DISTRICT COURT**
 8 **FOR THE DISTRICT OF ALASKA AT JUNEAU**

9 MYRNA I. JOHNSON,)
 10 Plaintiff,)
 11 vs.)
 12 FRED MEYER STORES, INC., and)
 13 JAIME SAN MIGUEL,)
 14 Defendants.) Case No. J-04-008 CV (RRB)

15 **PLAINTIFF'S OBJECTIONS TO DEFENDANTS' JURY INSTRUCTIONS**

16 Pursuant to this Court's April 5, 2007, *Pretrial Order*, Plaintiff hereby submits her
 17 objections to Defendants' proposed jury instructions.

18 **1. Summary of Claims, *Defendants' Proposed Jury Instruction No. 1*, p. 4**

19 Defendants have not provided an accurate summary of Plaintiff's claims.

20 Plaintiff claims that Defendants wrongfully terminated her employment at Fred Meyer
 21 in breach of the covenant of good faith and fair dealing when Defendants subjected her to a
 22 sustained campaign in order to orchestrate Plaintiff's demotion or termination, threatened her
 23 with demotion or termination, and then wrongfully terminated her from her "for cause"
 24 employment at Fred Meyer. Plaintiff claims that Defendants' adverse employment actions
 25 towards Plaintiff were based on improper motives and bad faith. She also claims that a
 26 reasonable person in Plaintiff's position would regard Defendants' actions toward Plaintiff as
 27 unfair because they amounted to disparate employee treatment and violated public policy.

28 **2. Employment "At-Will," *Defendants' Proposed Jury Instruction No. 9*, p. 12**

1 Defendants' proposed jury instruction incorrectly assumes that Johnson's employment
 2 relationship with Fred Meyer was "at-will." However, under Alaska law, where employers
 3 indicate that termination will occur only for cause, they must comply or be liable for damages.¹
 4 Employment policy manuals may create a "for-cause" employment agreement, and whether a
 5 given manual creates a "for-cause" employment relationship must be determined on the
 6 particular facts of each case.² The question of whether Johnson was discharged for good cause,
 7 or whether she was discharged for another reason is a question for the jury.³

8 The *Jones* Court also held that if an employer desires to keep employees from relying
 9 upon the personnel manual as modifying their employment contract, the employer must
 10 "clearly and conspicuously tell[] their employees that the manual is not part of the
 11 employment contract and that their jobs are terminable at the will of the employer with or
 12 without reason."⁴ Personnel manuals with clear and conspicuous disclaimers will "instill no
 13 reasonable expectations of job security and do not give employees any reason to rely on
 14 representations in the manual."⁵

15 Fred Meyer relies upon two primary manuals to describe the employment relationship
 16 with its employees; the Employee Handbook and the Fred Meyer Corporate Policy Handbook.
 17 These manuals repeatedly emphasize the concept that if Fred Meyer employees work hard, they
 18 will be treated fairly and rewarded with a "career" in the company (i.e., "doing what one does
 19 as a permanent occupation or lifework or for which one trains and which is undertaken as a
 20 permanent calling").⁶ The Fred Meyer Corporate Policy Handbook describes in detail

21 ¹ *Rutledge . Alyeska Pipeline Service Company*, 727 P.2d 1050, 1056 (Alaska 1986) ("it is well recognized that
 22 where employers indicate that termination will only occur for cause, they must comply or be liable for damages.")
 23 (citing *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 892 (1980)); *see also, Jones v. Central Peninsula
 24 General Hosp.*, 779 P.2d 783, 789 (Alaska 1989).

25 ² *Jones*, 779 P.2d at 787; *See also, Skagway City School Board v. Davis*, 543 P.2d 218, 222 (Alaska 1975); *Hammack v.
 26 Parker Drilling Co.*, 930 F.2d 27, 27 (9th Cir. 1991) (noting that under Alaska law, an employee handbook's promise to
 27 fire only for good cause may modify an at-will employment agreement and stating, "The *Jones* court's approval of
 28 *Toussaint* makes it unlikely that Alaska courts would distinguish between oral and written employer statements.");
Violett v. Pay N' Save Stores, Inc., 909 F.2d 1490 (9th Cir. 1990).

³ *Jones*, 779 P.2d at 789 (citing *Toussaint*, 292 N.W.2d at 896).

⁴ *Jones*, 779 P.2d at 787 (emphasis added).

⁵ *Jones*, 779 P.2d at 788.

1 employee responsibilities and consequences. Discharge is always described as a consequence
 2 of either a violation of some policy or when “necessary to protect the well-being of the
 3 company or its employees.” Violation of a Fred Meyer policy almost always has a disciplinary
 4 consequence, up to termination. There simply is no need for such consequences if employees
 5 cannot expect the corollary; if they follow the policies, they will not be subject to discipline
 6 including possible termination. Fred Meyer effectuates its policies with a progressive
 7 discipline system beginning with informal counseling, followed by a verbal warning, followed
 8 by a “verbal written warning” (i.e. a Written Warning Notice with the word “verbal” written at
 the top), and finally a Written Warning Notice.

9 Buried deep in the back of the employee handbook—after over fifty pages of Fred
 10 Meyer “career” propaganda and at least five blank pages for note-taking—the Employee
 11 Handbook contains the following disclaimer:

12 This handbook should not be construed and does not constitute a contract,
 13 expressed or implied, guaranteeing employment for any specific duration.
 14 Although we hope your employment relationship with us is long term, either you
 15 or the Company may terminate this relationship at any time, for any reason, with
 16 or without cause or notice. Please understand that no supervisor or representative
 of Fred Meyer has the authority to enter into any agreement with you for
 employment for any specific period of time or to make any promises or
 commitments contrary to the foregoing.

17 Above the copyright information on a back page in the “Corporate Policy Manual,” with
 18 searching, the following disclaimer can also be found:

19 This handbook is not intended to, and indeed does not bestow any additional
 20 rights to employment or employment benefits to Fred Meyer Stores employees.
 21 In addition, Fred Meyer reserves the right to depart from these guidelines and to
 take action up to and including immediate discharge when, in its opinion, such
 action is necessary to protect the well-being of the company or its employees.

22 These disclaimers are neither “conspicuous” nor “clear.” The manuals set out in
 23 exacting detail Fred Meyer’s policies, and warn that a deviation from those policies can result
 24 in discipline up to discharge. The disclaimers are easily overlooked because most employees
 25 do not look past the main text of the manual or to the copyright page for information about their
 26 employment.

28⁶ Webster’s Online Dictionary.

1 Fred Meyer's oral and written representations create the impression, contrary to the
 2 disclaimers, that Fred Meyer employees are to be provided with certain job protections.
 3 Accordingly, Johnson had every reason to believe that she had job security and that she would
 4 only be disciplined, including demotion or termination, according to Fred Meyer policies,
 5 practices and procedures. Fred Meyer should not be allowed to instill reasonable expectations
 6 of job security or dreams of a "career" in the company, and then withdraw the basis for those
 7 expectations when the employee's performance is no longer desired.

8 At a minimum, there is a factual dispute regarding the nature of Johnson's employment
 9 relationship with Fred Meyer. Consequently, an "at-will" jury instruction is inappropriate.

10 **3. The Implied Covenant of Good Faith and Fair Dealing, *Defendants' Proposed Jury
 11 Instruction No. 10, p. 13-14.***

12 Defendants' proposed instruction incorrectly states that Plaintiff's employment
 13 relationship with Fred Meyer was "at-will."

14 Defendants' instruction is unreasonably narrow. Plaintiff's claim is not limited to
 15 disparate treatment. Plaintiff claims that Defendants' adverse employment actions towards her
 16 were based on improper motives and bad faith. She also claims that a reasonable person in
 17 Plaintiff's position would regard Defendants' actions toward Plaintiff as unfair because they
 18 amounted to disparate employee treatment and violated public policy. Because Defendants'
 19 proposed jury instruction is unreasonably narrow, Plaintiff proposes the Alaska *Civil Pattern
 20 Jury Instruction:*

21 "In every contract, there is an implied promise of good faith and fair dealing. This
 22 means that each party promises not to do anything to destroy or injure the right of the other
 23 party to receive the benefits of the contract.

24 "The Defendants violated the implied promise of good faith and fair dealing if you find
 25 that it is more likely true than not true that the defendants deprived the plaintiff of a benefit of
 26 the contract:

- 27
- 28
-
- 29 1) Intentionally; or
 30 2) By acting in a manner that a reasonable person would regard as unfair."⁷

1 Plaintiff also objects to Defendants' incorporation of "constructive discharge" as a
 2 prerequisite for Plaintiff's claim. There is a factual dispute whether Plaintiff was terminated by
 3 Fred Meyer. The "constructive discharge" definition is only necessary if the jury concludes
 4 that Johnson's tearful exodus from the extremely emotional confrontation with her large, male
 5 supervisors was a voluntary "walk-off." Accordingly, a separate jury instruction should be
 6 made regarding constructive discharge. Plaintiff proposes the following:

7 Even if you conclude that Plaintiff voluntarily "walked off" the job at Fred Meyer,
 8 where an employer makes working conditions so intolerable that the employee is forced into an
 9 involuntary resignation, the employer is as liable for any illegal conduct involved therein as if it
 10 had formally discharged the employee.⁸ To establish constructive discharge it is not necessary
 11 that the employee actually "prove that the employer acted with a specific intent of causing the
 12 employee to resign."⁹ Rather the employee "has the burden of showing that a reasonable
 13 person in the employee's position would have felt compelled to resign."¹⁰ A constructive
 14 discharge may result from a "sustained campaign of harassment" against an employee.¹¹

14 **4. Employee Criticism, Defendants' Proposed Jury Instruction No. 11, p. 15**

15 Defendants' jury instruction regarding employee criticism is an incorrect statement of
 16 Alaska law, and is therefore, misleading. Contrary to Defendants' assertion, *Pitka v. Interior*
 17
 18

19 ⁷ *Alaska Civil Pattern Jury Instructions*, Instruction 24.15; *Guin v. Ha*, 591 P.2d 1281, 1291 (Alaska 1979) ("In
 20 every contract . . . there is an implied covenant of good faith and fair dealing that neither party will do anything
 21 which will injure the right of the other party to receive the benefits of the agreement."); *Ramsey v. City of Sand*
 22 *Point*, 936 P.2d 126, 133 (Alaska 1997) ("The covenant of good faith and fair dealing is implied in every contract
 23 in order to effectuate the reasonable expectations of the parties to the agreement, not to alter those expectations.");
 24 *Casey v. Semco Energy, Inc.*, 92 P.3d 379, 384 (Alaska 2004) ("A party must act in subjective good faith, meaning
 25 that it cannot act to deprive the other party of the explicit benefits of the contract, and in objective good faith,
 26 which consists of acting in a manner that a reasonable person would regard as fair."); *Pitka v. Interior Regional*
 27 *Housing Author.*, 54 P.3d 785, 789 (Alaska 2002) (stating that disparate employee treatment, terminations on
 28 unconstitutional grounds, and firings that violate public policy are examples of actions that may violate the
 objective aspect of the covenant).

29 ⁸ *Beard v. Baum*, 796 P.2d 1344, 1350 (Alaska 1990) (Beard I).

30 ⁹ *Cameron v. Beard*, 864 P.2d 538, 547 (Alaska 1993).

31 ¹⁰ *Cameron*, 864 P.2d at 547.

32 ¹¹ *Cameron*, 864 P.2d at 547.

1 Regional Housing Author¹² and other cases cited by Defendants do not establish a general rule
 2 that “The fact an employee’s feelings were hurt by [employer] criticism, or that she believed
 3 she might lose her job, does not support a claim of constructive discharge.” Instead, the Alaska
 4 Supreme court held that “criticism of job performance *alone* is not enough to create intolerable
 5 work conditions.”¹³ In this case, there is sufficient evidence of a sustained campaign of
 6 harassment and unwarranted criticism of Johnson’s work performance.

7 **5. Damages, Defendants’ Proposed Jury Instruction No. 12, p. 16-17**

8 Defendants’ proposed jury instruction regarding damages is an incorrect statement of
 9 Alaska law. A wrongfully discharged employee is entitled to the total amount of the agreed
 10 upon salary for the unexpired term of the employment, less what she could earn by making
 11 reasonable or diligent efforts to obtain similar employment.¹⁴ Under Alaska law, the employer
 12 has the burden of proving *both* that the employee reasonably could have gotten alternative
 13 employment *and* the amount of compensation that the employee reasonably could have
 14 earned.¹⁵ Plaintiff attaches Alaska’s *Civil Pattern Jury Instruction* as an alternative jury
 15 instruction regarding damages.

16 In addition, Defendants violated public policy when they wrongfully discharged
 17 Johnson in breach of the covenant of good faith and fair dealing. A breach of the covenant of
 18 good faith and fair dealing which is also in violation of an explicit public policy gives rise to

19
 20 ¹² *Pitka*, 54 P.3d at 789.

21
 22 ¹³ *Id.* at 790 (emphasis added); *see also, Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989) (holding that there was
 23 insufficient evidence of any aggravating factors or differential, discriminatory or retaliatory treatment by employer and
 24 concluding that the plaintiff’s “subjective personal discomfort . . . was most likely not the product of any action by
 25 appellees but, rather, the product of human nature); *Agnew v. Basf Corp.*, 286 F.2d 307, 310 (6th Cir.) (“[w]e have held
 26 that criticism in performance reviews and institution of performance improvement plans, *alone*, do not constitute
 27 objectively intolerable conditions.)

28
 29 ¹⁴ *Skagway City School Board v. Davis*, 543 P.2d 218 (Alaska 1975); *Luedtke v. Nabors Alaska Drilling, Inc.*, 834
 30 P.2d 1220, 1226 (Alaska 1992); *Redman v. Department of Education*, 519 P.2d 760, 771 (Alaska 1974); *Wien Air
 31 Alaska v. Bubbel*, 723 P.2d 627, 632 (Alaska 1986).

32
 33 ¹⁵ *University of Alaska v. Chauvin*, 521 P.2d 1234, 1240 (Alaska 1974); *see also, Continental Insurance Co. v.
 34 Ursin Seafoods, Inc.*, 977 F.2d 587 (9th Cir. 1992) (citing *Chauvin*, 521 P.2d at 1240) (“The party alleging a failure
 35 to mitigate bears the burden of showing that the damaged party failed to make reasonable efforts or reasonable
 36 expenditures to mitigate its damages.”).

1 tort damages, as well as contract damages.¹⁶ Accordingly, she may recover for all the losses
2 she suffered as a result of Defendants' unlawful conduct, including her emotional distress,
3 anxiety, humiliation, and lost self-esteem.

4

5 DATED this 24th day of September, 2007, at Juneau, Alaska.

6

7

Respectfully submitted,
CHOATE LAW FIRM LLC

8

9

10 s/ *Jessica L. Srader*

11

12

JESSICA L. SRADER
424 N. Franklin Street
Juneau, AK 99801
Phone: (907) 586-4490
Fax: (907) 586-6633
EM: lawyers@choatelawfirm.com
AK Bar: 0412105

13

14

15 Attorneys for Plaintiff

16

17

18

19

20

21

22

23

24

25

26

27

28

¹⁶ *Kinzel v. Discovery Drilling, Inc.*, 93 P.3d 427, 434-36 (Alaska 2004).

1 **JURY INSTRUCTION NO. ____**

2 **EMPLOYEE'S DAMAGES FOR BREACH OF EMPLOYMENT**
3 **CONTRACT FOR AN UNSPECIFIED TERM**

4 If you find in favor of the plaintiff, you must then decide how much money, if any, would
5 fairly compensate the plaintiff for defendant's breach of the employment contract.

6 To determine the amount of damages plaintiff is entitled to receive, you must first
7 calculate the amount of compensation agreed upon for the period from the date of the breach to
8 the date of trial. From this amount, you must subtract the amount of any compensation the
9 plaintiff actually earned between the date of the breach and the date of trial which the plaintiff
10 would not have earned if employed by the defendant.

11 You must then calculate the amount of compensation agreed upon for the period from the
12 date of trial to the date on which the contract reasonably could be expected to terminate. From
13 this amount, you must subtract the amount of compensation which the defendant has shown it is
14 more likely true than not true that plaintiff reasonably could be expected to earn between the date
15 of trial and the date the contract reasonably could be expected to terminate through a diligent
effort to obtain comparable employment.

16 To determine the amount plaintiff is entitled to receive as damages, add the result of the
17 first computation and the result of the second computation.

18
19 *Alaska Civil Pattern Jury Instruction 24.09.*

PROOF OF SERVICE

STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT JUNEAU

I am employed in the City and Borough of Juneau, State of Alaska. I am over the age of 18 and not a party to the within action. My business address is 424 N. Franklin Street, Juneau, AK 99801.

On September 24, 2007, I served the foregoing document described as ***Plaintiff's Objections to Defendants' Proposed Jury Instructions***, on the interested parties in this action by serving the original true copies, addressed as follows:

James Dickens
 Miller Nash LLP
 Attorney For: Fred Meyers
 4400 Two Union Square
 601 Union Street
 Seattle, WA 98101-2352
 Phone: (206) 622-8484
 Fax: (206) 622-7485

Peter Gruenstein
 Gruenstein & Hickey
 Attorney For: Fred Meyers
 500 L Street, Suite 401
 Anchorage, AK 99501
 Phone: (907) 258-4338
 Fax: (907) 258-4350

By mail, I deposited such envelope(s) in the mail at Juneau, Alaska, with postage thereon fully prepaid.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Juneau, Alaska, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

By personal service, I delivered such envelope(s) by hand to the office(s); the court box of the addressee(s).

By facsimile, I transmitted such documents from Juneau, Alaska, to the offices of the addressee(s).

By email, I transmitted such documents from Juneau, Alaska, to the email address of the addressee(s).

By electronic service through the court of record's electronic service system.

(State) I declare under penalty of perjury under the laws of the State of Alaska that the foregoing is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made.

Executed on September 24, 2007, at Juneau, Alaska.

s/ Annya Ritchie

CHOATE LAW FIRM LLC